Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

ELMORE ROY ANDERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit Court of Appeals' decision regarding subject matter jurisdiction under the Federal Antitrust Laws is contrary to *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) ["*Hartford Fire*"], *United States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945, sitting as the court of last resort) ["*Alcoa*"] and the Foreign Trade Antitrust Improvements Act ["FTAIA"], 15 U.S.C. § 6(a).

II. Whether the decision of the Eleventh Circuit Court of Appeals is in conflict with decisions of other Federal Appeals Courts with respect to the application of the FTAIA to antitrust cases involving export or non-import foreign commerce.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CITED AUTHORITIES	v
STATEMENT OF BASIS FOR JURISDICTION	1
CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS	1
STATEMENT OF THE CASE	2
A. Chronology of Proceedings	2
B. Statement of Facts	2
C. Basis for Federal Jurisdiction in the First Instance	5
ARGUMENT	5
A. The Decision Conflicts with the FTAIA in That it Creates a New Judicial Exception	9
B. The Decision's Supplanting of the FTAIA's "Substantial and Intended Effects" Requirement with the Judicially-Created "Government Programs" Exception Causes a Conflict Among the Federal Circuits	11
C. The Eleventh Circuit's Requirement of Proof of Involvement in Commerce with Foreign Nations Directly Conflicts with the Statutory Framework Embodied in the FTAIA	12
D. The Eleventh Circuit Erred in Concluding that the Government Proved a Relevant U.S. Product and Geographic Market and an Intended and Substantial Effect on It	14

TABLE OF CONTENTS—Continued

Page

E. The Conspiracies Hatched by Schmidt with his European Colleagues had no Effect on Competition in any U.S. markets and the Government Proved None 15

CONCLUSION 16

APPENDIX A 1a

APPENDIX B 23a

TABLE OF CITED AUTHORITIES

CASES — Page

Caribbean Broadcasting Sys, Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1085 (D.C. Cir. 1998) 6, 11

Den Norske Stats Oljeselskap AS v. HeereMac VOF, 241 F.3d 420, 426 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002) 6, 11

Dee-K Enterprises, Incorporated v. Heveafil SND. BHD, 299 F.3d 281, 294 (4th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3339 (U.S. Oct. 25, 2002)(No. 02-649) 11, 13

Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) 5, 6, 12

In re Copper Antitrust Litg., 117 F.Supp.2d 875, 881 (W.D. Wis. 2000), *aff'd as modified, Loeb Industries, Inc. v. Sumitomo Corp.*, 306 F.3d 469 (7th Cir. 2002) 6

Kruman v. Christie's Int'l, PLC, 284 F.3d 384 (2nd Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3169 (U.S. Sep. 3, 2002)(No. 02-340) 7, 8, 11

Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986) 5

McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 242 (1980) 15

Metallgesellschaft AG v. Sumitomo Corporation of America, 325 F.3d 836, 842 (7th Cir. 2003).. 11

Sniado v. Bank Austria AG., 174 F. Supp. 2d 159, 164-65 (S.D.N.Y. 2001) 8, 11

United Phosphorus Ltd. v. Angus Chem. Co., 131 F. Supp. 2d 1003, 1008 (N.D. Ill. 2001), *aff'd*, 322 F.3d 942 (7th Cir. 2003) 5

United Phosphorus, Ltd. v. Angus Chemical Co., 322 F.3d 942, 952 (7th Cir. 2003) 15

TABLE OF CITED AUTHORITIES—Continued

Page

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) ..... i, 6

United States v. Nippon Paper Industries, Ltd., 944 F. Supp. 55 (D. Mass. 1996) 6

United States v. Nippon Paper Industries Co., Ltd., 109 F.3d 1, 6-8 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998) 6, 7, 11, 12

West India Oil Co. v. Sancho, C.C.A. Puerto Rico, 108 F.2d 144, 147 (1st Cir. 1939), *aff'd*, 311 U.S. 20 (1940) 13

STATUTES

Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6(a) ..... *passim*

Sherman Act, 15 U.S.C. § 1 ..... 2, 5

18 U.S.C. § 371 ..... 2, 5

28 U.S.C. § 1254 1

OTHER AUTHORITY

H.R. Rep. No. 97-686, 97th Cong., 2d Sess. 1982 U.S.C.C.A.N. 2488 (1982) 8, 10, 12, 13

Areeda & Hovenkamp, Antitrust Law, § 273 (2d ed. 2000) 15

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United States v. Anderson, 326 F.3d 1319 (11th Cir. 2003), 2003-1 Trade Cases ¶ 74,002.

STATEMENT OF BASIS FOR JURISDICTION

The decision sought to be reviewed was entered by the Eleventh Circuit Court of Appeals on April 11, 2003. Pursuant to 28 U.S.C. § 1254, this Court possesses jurisdiction to review on certiorari the decision in question.

STATUTE INVOLVED IN CASE

Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

> **(A)** on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> **(B)** on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> **(2)** such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C.A. § 6a.

STATEMENT OF THE CASE

A. Chronology of Proceedings:

Petitioner Anderson was indicted in the Northern District of Alabama in July, 2001 and charged with violating § 1 of the Sherman Act, 15 U.S.C. § 1, and conspiracy to defraud the United States under 18 U.S.C. § 371. R1-1-1-2, 10. Anderson pled not guilty, was tried to a jury in February, 2002, found guilty and sentenced to 36 months in prison and a fine of $25,000. Anderson's appeal to the Eleventh Circuit Court of Appeals resulted in an affirmance in part on April 11, 2003 [the "Decision"]. Anderson filed a timely Petition for Rehearing and Rehearing en Banc on May 2, 2003, and that Petition was denied on June 12, 2003.

This Petition for a Writ of Certiorari is timely filed within 90 days of the Decision and prior to the Eleventh Circuit's issuance of the mandate.

B. Statement of Facts:

Anderson is a 75 year-old former president of Bilhar International Establishment f/k/a Harbert International Estab-

lishment ["Bilhar"]. He has been diagnosed as being in the early stages of dementia and suffering from depression. R7-203-Tab 7.

Following his honorable discharge from the United States Navy where he saw action in World War II, Anderson was employed with two Boston-based construction firms, the last of which was the Perini Corporation, where he worked for over 20 years, achieving the position of project manager. R7-203-Tab 7. In this position, he oversaw numerous international construction projects in South America and the Middle East. R7-203. He joined Harbert International Establishment (now known as Bilhar) in 1978, serving as its president, and retired in 1996. R7-203-Tab 7.

The conduct that was the subject of the indictment occurred 12 to 13 years prior to the filing of the charges. According to the government, Anderson, the two corporate defendants, Bilhar and BHIC, along with which he was indicted, and other named and unnamed companies and their principals, *all of which were foreign*, entered into a single, "overarching" conspiracy to rig bids on three contracts—designated as Contracts 20A, 29 and 07—for the construction of wastewater projects in Egypt. See generally, R1-1. The contracting authority for each of the three contracts was the "Cairo Wastewater Organisation" ["CWO"], an Egyptian governmental entity having no relationship to any person or firm connected to the United States. R14-138; Defendant Exhibit 36. The projects were funded, in whole or in part, by the United States Agency for International Development ["AID"]. R15-379, 510. However, AID had no ownership or financial interest in the Egyptian projects, and simply served as a donor. Defendant Exhibit 36.

Contract 20A, which was bid in August, 1988, and re-bid the following December, was a lengthy sewer pipe installation project in Cairo, Egypt. The prospective bidders on it were Frucon, owned by the German company, Bilfinger +

Berger BmbH ["B+B"], George A. Fuller & Company ["GAF"], owned by Archiroden Group ["Archiroden"], a company organized under Panamanian law and located in Geneva, Switzerland, and the joint venture of Harbert International, Inc. ["HII"] and J.A. Jones Construction Company ["JAJ"] ["Harbert/Jones"]. Defendant Exhibit 32. JAJ's parent was Philipp Holzmann AG, another German-owned organization headquartered in Frankfurt, Germany. HII was located in Birmingham, Alabama. R14-279.

On Contract 29, which was bid in July, 1989, the two prequalified bidders were Harbert/Jones and Sadelmi USA, Inc., later known as ABB SUSA, Inc. ["SUSA"], a United States company whose ultimate parent company was ABB ASEA Brown Boveri, Ltd., a Swiss company, based in Zurich, Switzerland. R1-1; R15-451-453; Government Exhibit 20. This contract covered the construction of the Abu Rawash Wastewater Treatment Plant in Egypt.

Finally, the third contract claimed by the government to be part of the conspiracy, Contract 07, was also a large, wastewater-related construction contract in Alexandria, Egypt, and was bid in November, 1990. On that project, the prequalified bidders were Frucon, Harbert/Jones and a Boise, Idaho-based company, Morrison-Knudsen ["MK"]. Government Exhibit 21a. Other than HII, MK was the only entirely U.S.-owned company involved in the three construction projects that the government charged were rigged. However, the government stated explicitly that MK had no involvement in any of the conduct charged as illegal. R18-1008.

The government's evidence of the alleged rigging of each of the three contracts undeniably demonstrated that one individual—Peter Schmidt, a German national and director at Holzmann—was the driving force behind, and was shown to have been directly involved in, the purported illicit conduct on all three contracts. The grand jury indicted him in July, 2001, but he has not been brought to trial. He is retired,

believed to be living in Europe and not expected to travel to the United States to face the charges brought against him. R15-467.

The government called seven foreign witnesses (Kadenbach, Hoffmeister, Hermann and Kaus, from Germany, Greselin and Ruggieri from Italy and Iatrou from Greece) to testify about the purported bid rigging on each of the three Egyptian construction contracts. Each foreign witness appeared at trial in Birmingham, Alabama voluntarily pursuant to either a cooperation or immunity agreement with the government. Their collective testimony was that the conspiracy's ringleader, Schmidt, met or communicated by telephone with them a total of 21 times. The meetings occurred in Frankfurt, Germany, Milan, Italy and Lugano, Switzerland, to discuss the pre- and post-bid arrangements. *None of the meetings took place in the United States and none of the telephone calls were placed from or received in this country.*

C. Basis for Federal Jurisdiction in the First Instance:

The basis for federal jurisdiction in the district court is 15 U.S.C. § 1 and 18 U.S.C. § 371.

ARGUMENT

It is well-established that the Sherman Act reaches conduct beyond our borders, but only when that conduct is intended to produce, and does in fact produce, some substantial effect on competition in the United States. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986). Congress enacted the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6(a) ("FTAIA" or the "Act") in 1982 "because [Congress] believed that American jurisdiction over international commerce should be limited to transactions that affect the American economy." *United Phosphorus Ltd. v.*

Angus Chem. Co., 131 F.Supp.2d 1003, 1008 (N.D. Ill. 2001), *aff'd*, 322 F.3d 942 (7th Cir. 2003) (*citing Hartford Fire*, 509 U.S. at 796, n.23 (1993)).

The standards set out in the FTAIA must be used "to analyze whether conduct related to international trade has had an effect of the nature and magnitude necessary to provide [a federal court] with subject matter jurisdiction." *Caribbean Broadcasting Sys, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1085 (D.C. Cir. 1998).

The Act provides that United States antitrust law does not apply to non-import foreign conduct unless "(1) such conduct has a direct, substantial, and reasonably foreseeable effect on United States domestic commerce, and (2) such effect gives rise to the antitrust claim." *Den Norske Stats Oljeselskap AS v. HeereMac VOF*, 241 F.3d 420, 426 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002). The same standard for determining whether foreign conduct constitutes a Sherman Act violation in a civil case applies in criminal cases. *United States v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1, 6-8 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

Prior to this case, there has only been one other reported criminal case—*United States v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997)—in which a federal appeals court has considered whether the federal antitrust laws may be applied to punish conduct occurring outside the United States. In that case, the First Circuit reversed the district court's dismissal of the indictment (*U.S. v. Nippon Paper Industries, Ltd.*, 944 F. Supp. 55 (D. Mass. 1996)) on the basis of the Supreme Court's decisions in *Hartford Fire* and *Alcoa*. However, it refused to base its holding on the FTAIA. 109 F.3d at 4; *see In re Copper Antitrust Litg.*, 117 F.Supp.2d 875, 881 (W.D. Wis. 2000), *aff'd as modified, Loeb Industries, Inc. v. Sumitomo Corp.*, 306 F.3d 469 (7th Cir. 2002) (citing *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2nd Cir. 1945)) (Absent such effect there can

be no Sherman Act violation for the simple reason that "Congress lacks the power to criminalize behavior that has no consequences within the United States. There must be a jurisdictional nexus between the anticompetitive conduct and commerce within the United States.").

A recent appellate decision in *Kruman v. Christie's Int'l, PLC*, 284 F.3d 384 (2nd Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3169 (U.S. Sep. 3, 2002) (No. 02-340), although a civil antitrust case, confirms the viability of the "substantial effects" theory of *Nippon*. In that case, the Second Circuit clearly set forth the history of the jurisprudence surrounding the application of § 1 of the Sherman Act to conduct directed at foreign markets. The *Kruman* court first noted that "[t]here is a distinction between anticompetitive conduct directed at foreign markets and that only affects the competitiveness of foreign markets and anticompetitive conduct directed at foreign markets that directly affects the competitiveness of domestic markets." *Kruman*, 284 F.3d at 393. The court found that the antitrust laws only apply to the second type of conduct because such suits benefit U.S. markets regardless of where the conduct occurs or is directed, but do not apply to purely foreign effects because "our markets do not benefit when antitrust suits stop or deter anticompetitive conduct directed at foreign markets without an effect on our markets." *Id.*

In *Kruman*, the Second Circuit stated:

> If conduct affecting foreign markets has a substantial but beneficial effect on our markets, such conduct does not implicate the concerns of the antitrust laws, which are meant to protect our markets from negative effects.

Kruman, 284 F.3d at 394.

The Second Circuit stated that the plaintiff was required to show that the alleged agreement to fix prices in foreign markets itself, not the resulting imposition of higher prices,

had the requisite effect on domestic commerce. The court based its conclusion on the determination that "the FTAIA provides another significant limit on the reach of the antitrust laws" in that it requires proof that "[t]he 'effect' of the *conduct* must be 'direct, substantial and reasonably foreseeable . . . .'" *Kruman*, 284 F.3d 399, 402 (emphasis added). The court also observed that "this limit will likely prevent conduct that merely has an ancillary effect on our markets from being actionable under our antitrust laws." 284 F.3d at 402.

Here, if anything, the evidence showed that the meetings at which the alleged agreements to rig bids were entered into all occurred in Frankfurt, Germany and related to three construction projects, all located in Egypt. Regardless of any impact the alleged conduct might have had on the market for construction contracts in Egypt, or upon competition for those contracts among the European firms that were the participants in the alleged bid rigging arrangements and their rivals, the government failed to show the requisite substantial and intended effect on any *market* in the United States.[1]

In fact, in the instant case the government listed for the jury the proof it thought satisfied the substantial effects element: 1) U.S. money was spent on these contracts; 2) supplies, equipment and materials were purchased in the United States;

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[1] The simple fact that the alleged co-conspirators included an American corporation could not establish a Sherman Act violation absent the required effect on domestic commerce. H.R. Rep. No. 97-686 at 9-10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487. Furthermore, the fact that American dollars are spent overseas is insufficient to establish a Sherman Act violation unless the requisite domestic effect is proved. *Sniado v. Bank Austria AG.*, 174 F. Supp. 2d 159, 164-65 (S.D.N.Y. 2001) (*citing McElderry v. Cathay Pacific Airways, Ltd.*, 678 F. Supp. 1071, 1078 (S.D.N.Y. 1988); (H.R. Rep. No. 97-686 at 9-10, *supra*)) ("[A]n allegation of mere monetary injury is not enough to state a Sherman Act claim; a Sherman Act plaintiff must show injury to a market or to competition in general, not merely injury to individuals.")

3) the goods "crossed state lines, and went through New Orleans and . . . went on a barge to Egypt;" and 4) "negotiation of . . . Treasury checks across state lines into different bank accounts." R18-1008-1010. The government went on to tell the jury that this proof established an effect (but not a substantial one) on both interstate *and foreign* commerce. *Id.* As the foregoing discussion demonstrates, rather than undertaking the analysis demanded by the FTAIA, the Decision bases its rejection of Anderson's subject matter jurisdiction challenge on three erroneous conclusions. Accordingly, Anderson's petition for certiorari should be granted so that these incorrect legal determinations may be reviewed and corrected.

A. The Decision Conflicts with the FTAIA in That it Creates a New Judicial Exception.

In holding that the FTAIA did not apply, the Eleventh Circuit Court of Appeals created a legal exception that is not contained in that statute or any applicable case law. Inexplicably, the Eleventh Circuit concluded that "[t]here is no indication Congress intended the FTAIA to apply to *government programs* such as USAID in which the U.S. government pays U.S. companies who [sic] have bid against other U.S. companies to complete construction projects in foreign countries." Decision at 23 (emphasis added). The Eleventh Circuit never explained how its judicially-created "government programs" exception relieves the government from the FTAIA's explicit requirement that the government prove an intended and substantial effect on a U.S. market where, as the following discussion demonstrates, export commerce is involved.

Indeed, the government never pressed such an argument at trial, undoubtedly in recognition of both its lack of any legal basis and its obligation to prove what it charged—anticompetitive conduct having the required effect on U.S.

commerce. Rejecting Anderson's jurisdictional challenge on the basis of this newly devised statutory exception was contrary to an Act of Congress—the FTAIA.

The effect of the Eleventh Circuit's decision could be potentially far reaching. If allowed to stand, the Decision could completely negate the Congressional intent underlying the amendment to the Sherman Act embodied in the FTAIA—to provide "a clear benchmark . . . for businessmen, attorneys and judges as well as our trading partners," of United States law and Department of Justice Enforcement standards. H. R. Rep. 97-686, 97th Cong., 2d Sess. 1982, 1982 U.S.C.C.A.N. 2488 (1982).

For example, if the Eleventh Circuit's decision remains the law, both civil litigants and the government will be permitted to argue that the FTAIA does not require proof of substantial and intended effects on a U.S. market in a case involving non-import foreign commerce, as long as some "government program" is involved in the transaction. Because of the total lack of any analysis or legal underpinning for the judicially-created "government programs" exception contained in the Decision, we are left to guess about what constitutes a "government program" and which are sufficient to allow an antitrust litigant to invoke the subject matter jurisdiction of a federal court.

Thus, arguments by future antitrust plaintiffs (and the government) that seek to expand the extraterritorial reach of the U.S. Antitrust Laws will be limited only by the legal creativity of counsel, as the Decision provides no objective guidance regarding the scope of the Eleventh Circuit's new exception to the FTAIA. Limiting, not expanding, the number of antitrust cases involving foreign conduct in U.S. courts was one of the identified dangers that Congress sought to address when it passed the FTAIA. The Eleventh Circuit's Decision has revitalized that danger.

B. The Decision's Supplanting of the FTAIA's "Substantial and Intended Effects" Requirement with the Judicially-Created "Government Programs" Exception, Causes a Conflict Among the Federal Circuits.

The Eleventh Circuit has found that the government did not have to prove the substantial and intended effects on a U.S. market required by the FTAIA in this case because of the existence of "government programs." Through this ruling, the Eleventh Circuit has established itself as a minority of one among the other federal circuits. When five of the other federal circuits were presented with facts involving foreign conduct that were similar to those in Petitioner's case, all uniformly concluded that the FTAIA's "substantial and intended effects" subject jurisdiction standard applies: Second Circuit, *Kruman v. Christie's Int'l, PLC*, 284 F.3d 384 (2nd Cir. 2000); Fourth Circuit, *Dee-K Enterprises, Incorporated v. Heveafil SND. BHD*, 299 F.3d 281, 294 (4th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3339 (U.S. Oct. 25, 2002)(No. 02-649) (dicta—Fourth Circuit found the FTAIA did not apply because only import commerce was affected, and that the "links to the United States [were] mere drops in the sea of conduct that occurred in Southeast Asia (and around the world))." 299 F.3d at 295; Fifth Circuit, *Den Norske Stats Oljeselskap AS v. HeereMac VOF*, 241 F.3d 420, 426 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002); Seventh Circuit, *Metallgesellschaft AG v. Sumitomo Corporation of America*, 325 F.3d 836, 842 (7th Cir. 2003); D.C. Circuit, *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C.Cir.1998).[2]

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[2] The First Circuit represents a third viewpoint among the circuits with regard to analyzing the extraterritorial reach of the Federal Antitrust Laws. In *United States v. Nippon Paper Industries Co.,Ltd.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998), that court applied the "substantial and intended effects" test to the foreign conduct that was

The Eleventh Circuit's refusal to insist upon *both* the more exacting "substantial and intended effects" standard *and* to require actual proof of a dignity equal to that standard creates a conflict among the other six federal circuits that have considered similar issues and adhered to the federal law as embodied in the FTAIA. Indeed, the Eleventh Circuit's decision may result in the unintended consequence of making the states covered by the Eleventh Circuit the new venue of choice for plaintiffs' (and government) cases that raise claims (and charges) involving foreign antitrust activity.

C. The Eleventh Circuit's Requirement of Proof of Involvement in Commerce with Foreign Nations Directly Conflicts with the Statutory Framework Embodied in the FTAIA.

The Eleventh Circuit also incorrectly held that the FTAIA does not apply to this case because Anderson "fail[ed] to articulate how this scheme involves trade or commerce with foreign nations." Decision at 23. This observation likewise misreads the FTAIA and placed a non-existent burden on Anderson. As an initial matter,

> The FTAIA's amendment of the Sherman Act requires that all export transactions and non-import foreign transactions be proved to have a "direct, substantial and reasonably foreseeable effect" on commerce within the United States to be subject to the U.S. antitrust laws.

H. R. Rep. 97-686, 97th Cong., 2d Sess. 1982, 1982 U.S.C.C.A.N. 2493-95 (1982) (emphasis added). While the

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proved in that case, but cited as its authority to do so this Court's decision in *Hartford Fire*. In electing not to apply § 6(a)—which, interestingly, the government prosecutors urged it to apply—the First Circuit stated that "[t]he FTAIA is inelegantly phrased and the [C]ourt in *Hartford Fire* declined to place any weight on it. *See Hartford Fire,* 509 U.S. at 796 n. 23, 113 S.Ct. at 2909 n. 23. We emulate this example and do not rest our ultimate conclusion about Section One's scope upon the FTAIA." *Nippon Paper Industries*, 109 F.3d at 4.

term "export transactions" is not defined in the FTAIA, it is elementary that a U.S. firm's sale of construction services and materials to Egypt, which is what occurred here, would be considered such a transaction. *West India Oil Co. v. Sancho, C.C.A. Puerto Rico*, 108 F.2d 144, 147 (1st Cir. 1939), *aff'd*, 311 U.S. 20 (1940) (export trade is transportation of goods from U.S. to foreign countries).

Even if the transactions in this case are somehow not deemed to be export transactions, they would be "non-import foreign transactions," and the fact that the conduct underlying them is predominately foreign would also implicate the FTAIA. *Dee-K Enterprises, Incorporated v. Heveafil SND. BHD*, 299 F.3d 281, 294 (4th Cir. 2002), *petition for certiorari filed*, 71 USLW 3339 (Oct 25, 2002) (NO. 02-649); 1982 U.S.C.C.A.N. at 2495. Here, all conspiracy meetings occurred in Europe, all payments made by conspirators were made from banks in Europe or the U.K. to banks in Europe, and all construction was performed in Egypt. Most of the USAID payments proved by the government were sent from a U.S. embassy in France or Egypt. In short, the conduct was overwhelmingly foreign, not domestic, and the FTAIA applied.

Indeed, the indictment confirms both the export and foreign character of the questioned transactions. In the section entitled "TRADE AND COMMERCE," the indictment states that supplies, material and "pieces of equipment" were shipped from the United States to Egypt. While the projects were to be funded by USAID, they were owned by the Cairo Wastewater Organisation ["CWO"].[3]

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[3] While Petitioner believes that the Eleventh Circuit imposed the unnecessary requirement on him to prove "trade with foreign nations" in order to bring the FTAIA into play, the evidence in this case even satisfies that non-existent condition. Ironically, if the Eleventh Circuit was correct and the FTAIA did not apply, then the Sherman Act did not apply either

D. The Eleventh Circuit Erred in Concluding that the Government Proved a Relevant U.S. Product and Geographic Market and an Intended and Substantial Effect on It.

The Eleventh Circuit also erred in rejecting Anderson's FTAIA argument, finding that even if the FTAIA applied, there was ample evidence at trial of "a substantial effect on domestic commerce." However, the methodology and proof the Eleventh Circuit used is entirely contrary to what is demanded by the FTAIA and this Court.

Listed in the Decision are the following six items of anecdotal commercial activity, the cumulative effect of which the Eleventh Circuit held established that Anderson's conduct "substantially affected domestic commerce:" 1) taking money from the U.S. Treasury; 2) making key decisions and agreements in Alabama and North Carolina (although there was no proof whatsoever of any domestically-made decision or agreement related to the illegal agreements); 3) depositing money in SouthTrust Bank in Birmingham, Alabama; 4) the purported making of payments to "other conspirators" out of the SouthTrust accounts (although there was absolutely no proof of such payments); 5) the purchasing of equipment and materials in the U.S.; and 6) the shipment of those materials and that equipment on U.S. freighters. However, there was no attempt by the Eleventh Circuit (because there was none by the government at trial) to connect any of those random commercial events to any defined product or geographic market, or the proof of any demonstrable effect on competition within that market, let alone a substantial one.

The Eleventh Circuit's mere cataloging of commercial occurrences in the Decision to find the requisite substantial

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and count one of the indictment should have been dismissed for lack of subject matter jurisdiction.

effect on U.S. commerce is at odds with the FTAIA's explicit requirements. In a prosecution like this one, Sherman Act jurisdiction requires proof of the relationship between the questioned anticompetitive conduct and interstate or foreign commerce.

As this Court has stated:

> Although the cases demonstrate the breadth of Sherman Act prohibitions, jurisdiction may not be invoked under that statute unless the relevant aspect of interstate commerce is identified; *it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce.*

McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 242 (1980) (emphasis added). Indeed, in discussing the effects of conduct directed at a foreign market, as the conduct was in this case—antitrust commentators have cautioned that "when the restraint is abroad, the possibility arises that it has no or only limited effect on any interest that the United States government is authorized to protect." Areeda & Hovenkamp, Antitrust Law, § 273 (2d ed. 2000).

E. The Conspiracies Hatched by Schmidt with his European Colleagues had No Effect on Competition in any U.S. Markets and the Government Proved None.

Here, if the prices charged for construction in Egypt by U.S. construction firms were higher, the arguable effect would have fallen on the CWO, which might not have had sufficient funding to complete additional water and sewer projects. However, it is pure speculation to conclude that the CWO's theoretical future loss would have any effect on U.S. commerce, let alone a substantial one. Such a speculative effect is not something the U.S. antitrust laws were designed to address. *United Phosphorus, Ltd. v. Angus Chemical Co.*,

322 F.3d 942, 952 (7th Cir. 2003) ("FTAIA limits the power of the United States courts . . . from nosing about where they do not belong."); *Den Norske Stats Oljeselskap AS*, *supra*. Because the projects in this case were export transactions or, if not, involved predominately foreign conduct, the FTAIA applied. As a result, the government was obligated, but failed, to prove an intended and substantial effect on a defined product and geographic market. Based on this failure and the absence of any "government programs" exception in the FTAIA, subject matter jurisdiction was lacking and the Eleventh Circuit should have reversed Anderson's conviction on count one of the indictment.

CONCLUSION

For the reasons discussed above, Petitioner Anderson respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed April 11, 2003]

No. 02-13168

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELMORE ROY ANDERSON,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Alabama

Before DUBINA and BLACK, Circuit Judges, and RYSKAMP *, District Judge.

RYSKAMP, District Judge:

Appellant-defendant Elmore Roy Anderson ("Anderson") appeals his convictions for various violations of federal law. For the reasons that follow, we affirm but remand for further sentencing by the district court.

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* "Honorable Kenneth L. Ryskamp, United States District Judge for the Southern District of Florida, sitting by designation.

I. STATEMENT OF THE CASE

A. Procedural Background

On July 25, 2001, a grand jury indicted Anderson and two corporate defendants, Bill Harbert International Construction, Inc. ("BHIC") and Bilhar International Establishment f/k/a Harbert International Establishment ("Bilhar"), for conspiracy to violate § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (Count One) and conspiracy to defraud the United States under 18 U.S.C. § 371 (Count Two). Anderson pleaded not guilty to both counts of the indictment. Before trial began, Bilhar negotiated a plea agreement with the government in which Bilhar pleaded guilty to Count One and paid a fine of $54 million. In return, the government dismissed the indictment against BHIC.

Anderson went to trial and the jury found Anderson guilty on both counts. Anderson moved for a judgment of acquittal at the close of the government's case, at the close of all evidence, and after the jury returned its verdict. The district judge denied the motion each time. Anderson was sentenced to thirty-six months of incarceration and was ordered to pay a fine of $25,000. The district court allowed Anderson to remain free pending the outcome of any appeal. Anderson then perfected this appeal.

B. Factual Background

Anderson served as president of Bilhar from 1978 to 1996. Bilhar is the foreign affiliate of BHIC, an Alabama corporation whose business consisted primarily of providing support services to the bidding and construction of international projects.

As a result of the Camp David Peace Accords in the late 1970s, the United States agreed to fund construction projects to improve the treatment of drinking and waste water in Egypt. The Egyptian government awarded the projects based

on sealed competitive bids from companies prequalified by USAID. In turn, the companies were paid by USAID. The projects included pump stations, pipelines, and wastewater treatment facilities.

Several U.S. companies, including Bilhar, were prequalified to bid on the Egyptian USAID projects. Bilhar and BHIC established a joint partnership with J.A. Jones Construction Co. ("Jones") of North Carolina and was prequalified as a bidder for USAID. A Bill Harbert entity held a controlling share of the joint venture throughout the prequalification stages.

Three other U.S. companies, ABB SUSA, Inc. ("SUSA"), the George A. Fuller Company ("Fuller"), and Fru-Con Construction, Inc. ("Fru-Con"), also bid on at least one of the three contracts. These companies were either subsidiaries of or wholly owned by foreign co-conspirators. Philipp Holzmann, a German company headquartered in Frankfurt, owned Jones. Peter Schmidt, a prominent leader in the conspiracy, was the supervisor of Holzmann's international operations and a member of its management board. He also supervised Holzmann's subsidiaries such as Jones. ABB ASEA Brown Boveri, Ltd., a Swedish/Swiss company, was the parent company of SUSA. The Archirodon Group, Inc., a Panamanian company, owned Fuller. Bilfinger + Berger BhbH "(B+B"), a German company, was the parent company of Fru-Con.

The prequalified bidders conspired to manipulate the competitive bids on the contracts by designating which company would win the bid in question before the bids were submitted. The bidders also arranged "loser's fees," lucrative subcontracts, or promises of winning future bids for the other bidders. The winning bidder added these costs into its bid. As a result, USAID paid not only an inflated price for the project, but also the loser's fees for the non-prevailing bidders.

1. Contract 20A

In 1988, USAID solicited bids from prequalified bidders to connect a wastewater treatment facility to pumping stations with nineteen kilometers of pipe in Cairo, Egypt. Three entities were prequalified to bid on the project: the Halbert-Jones joint venture, Fru-Con, and Fuller. Prior to the opening of the bids on August 4, 1988, Peter Schmidt contacted Dieter Kadenbach, a member of Fru-Con's supervisory board. Kadenbach met Schmidt at Schmidt's offices in Frankfurt, Germany. Representatives of the other bidders, including Anderson, were also present. Schmidt proposed that the companies rig the bids on Contract 20 to ensure that Halbert-Jones would win the contract. Schmidt contacted Kadenbach several weeks later and sought to work out the details. They agreed that Fru-Con would submit a higher bid than Halbert-Jones. In exchange, Schmidt agreed to pay Fru-Con two to three percent of the price of Contract 20A, or about $2,200,000.

Schmidt also worked out bid rigging agreements with representatives from Fuller, the third qualified bidder on Contract 20A. On August 3, 1988, Gunter Niebergall, a Holzmann employee Schmidt supervised, negotiated the terms of an agreement with Constantine Iatrou, an employee of Archirodon, Fuller's parent company. The agreement provided that Fuller would only serve as a subcontractor to Harbert-Jones on the project. Holzmann agreed to compensate Fuller for not bidding by either awarding Fuller a $25,000,000 subcontract and paying Archirodon a "fee" equal to three percent of the remaining contract value, or Holzmann would pay Archirodon a five percent "fee" of Contract 20A's value—about $5,000,000. Additionally, Harbert-Jones would not bid against Fuller for future USAID projects of approximately the same value. These details were specifically enumerated in the agreement.

The same day this agreement was signed, a letter was sent on Harbert letterhead to the Contract 20A project owner, Cairo Wastewater Organization (CWO), on behalf of the Harbert-Jones joint venture. The letter informed CWO that Harbert-Jones needed to increase its previously submitted bid by three to five percent due to last-minute price changes and other circumstances.

When the bids were opened, Harbert-Jones' bid of $129.3 million was the low bid. Fru-Con bid $151.8 million and Fuller did not submit a bid at all. Before the bids were opened, engineers for CWO estimated the cost would be about $60 million. Because of the large discrepancy, CWO and USAID engaged in a series of competitive negotiations with Harbert-Jones and Fru-Con and scheduled a second round of best-and-final bids for December 1988.

Prior to the December 1988 bidding, Schmidt met with Iatrou, Anderson, and several others on December 7. They discussed the August 3 agreement and negotiated a lower payoff on the bid-rigging scheme. Anderson wrote down the new agreement and signed it. Schmidt scratched out Anderson's name on the document because he was an "American and this agreement was between European companies." Schmidt and Iatrou signed the document instead.

The companies' revised bids were opened on December 12, 1988. Harbert-Jones was awarded Contract 20A on April 16, 1989. Payment for services on the contract was made directly to Harbert-Jones from the U.S. Treasury. Harbert-Jones made its payments to Fru-Con, Fuller, and Holzmann as they had agreed. When confusion arose as to when the payments between the conspirators were due, Anderson, Schrmdt, Iatrou, and others met in Frankfurt, Germany. Iatrou and Schmidt corresponded frequently about the issue, always referring to Anderson in the letters as "our friend" or their "contact in the U.S." Harbert-Jones completed the work on Contract 20A in 1993. The total contract price was

$107,071,000. Harbert-Jones earned a profit of $50,639,000 on the project.

2. Contract 07

Contract 07 involved the construction of large sewer tunnels in Alexandria, Egypt. Harbert-Jones was originally the only bidder on the contract, but their bid was deemed too high by CWO and USAID. Bids were solicited a second time, to be due on November 25, 1990. Two months before the bidding date, Schmidt called a meeting in his Frankfurt offices with Werner Hoffmeister, a representative of Fru-Con's parent company B+B. Anderson also attended the meeting. Schmidt asked Hoffmeister to rig Fru-Con's bid such that Harbert-Jones could win the contract. Hoffmeister told Schmidt that Fru-Con was very interested in competing for the project. Morever, because there was another prequalified bidder, Morrison-Knudson ("MK"), based in Boise, Idaho, there could be no effective agreement unless all three bidders agreed. Schmidt said he would ask Anderson to contact MK. Anderson did not make any response to this request, and Hoffmeister understood that Anderson would follow through with Schmidt's instructions. Two MK representatives testified that Anderson had not discussed with them rigging their bid, but Anderson did take a trip to Boise less than a month before the bidding date of Contract 07. His hotel receipt for the trip shows MK's business address as his contact information.

Two weeks after the Frankfurt meeting, Schmidt called Hoffmeister to inform him that MK would not agree to rig the bids. Schmidt and Hoffmeister therefore agreed to include a loser's fee in their bids such that if either company won the contract, it would pay the other a set sum of money.[1]

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[1] Hoffmeister cannot remember whether the sum of 1.5 million was to be in US. Dollars or German marks.

At a joint venture meeting prior to the bid date on Contract 07, Anderson told Johnny Ollis, an employee of Harbert-Jones, that Anderson needed room to maneuver in setting the bid. Ollis responded that they still needed to submit a competitive bid. Anderson replied that all the companies were on board and part of the "Frankfurt Club." Holzmann had "set it up," he said. Ollis was distressed by Anderson's comments and changed the subject.

Ultimately, MK submitted a bid on the contract but Fru-Con did not submit one. Hubert-Jones won the bid and paid Fru-Con a reduced lump sum.

3. Contract 29

In 1989, CWO solicited bids for a wastewater treatment project in Egypt referred to as Abu Rawash. The bids were due on July 2, 1989. Prior to the due date, Schmidt contacted Giovanni Greselin, a SUSA supervisor, and requested that Greselin come to Frankfurt to discuss construction contracts. Greselin went to Frankfurt knowing that Schmidt would propose a bid-rigging agreement.

At the meeting, Schmidt proposed an arrangement in which Harbert-Jones would bid high on Contract 29 and SUSA would bid high on a project in Europe. The parties also agreed that Harbert-Jones would be paid about $3 million in exchange for submitting a higher bid. Greselin indicated that he was interested in the deal but did not have the authority to close the deal.

While Greselin was in Frankfurt, Schmidt introduced him to a representative of Harbert-Jones. At trial, Greselin could not remember or did not know the representative's name. Anderson's own expense reports indicated, however, that he was in Frankfurt about the time of the meeting for "marketing," even though Harbert-Jones had no construction jobs in Frankfurt. Gordon Burles, a Harbert-Jones area manager, kept Anderson informed about the progress of

Contract 29, and Anderson himself forwarded correspondence related to the project to Schmidt. A letter from Anderson to the CWO project manager clearly indicated that Harbert, with Anderson as its vice president, was the sponsoring partner of the Harbert-Jones joint venture.

After the meeting concluded, Greselin met with his supervisor Luigi Ruggieri. Greselin showed Ruggieri a handwritten agreement or minutes from the meeting. Ruggieri realized the agreement was illegal and destroyed the document, but nevertheless gave Greselin permission to continue discussions with Schmidt that would allow SUSA to win the contract. Greselin oversaw the completion of the SUSA bid. When the bids were opened, SUSA had indeed submitted a lower bid than Harbert-Jones and was awarded the contract. Schmidt met with Ruggieri and made arrangements for SUSA's payment to Holzmann of $3.4 million. A Swiss subsidiary of Holzmann sent SUSA an invoice for the $3.4 million, and it was paid within a month. SUSA grossed a profit of more than $58 million on the project. The last payment from the U.S. Treasury to SUSA on the project was dated September 20, 1996.

4. The overarching conspiracy

At trial, the Government's theory of the case was that the three contracts were part of one overarching conspiracy. This theory was essential to the Government's case in order to connect Anderson to the bid rigging schemes on Contracts 20A and 07. The statute of limitations for a claim brought under the Sherman Act is five years, and the final payments on the first two contracts were made by January 18, 1995. The indictment against Anderson was not returned until July 25, 2001. The final payments on Contract 29, however, did not occur until September 20, 1996. Thus, if the three contracts are part of an overarching conspiracy, the last act of the conspiracy did not take place until September 1996, and the indictment would have been timely filed. The jury

accepted the Government's argument and convicted Anderson of conspiring to defraud the United States under the Sherman Act (15 U.S.C. § 1) and 18 U.S.C. § 371.

II. ISSUES

The defendant raises the following issues on appeal:

1. Whether there was sufficient evidence presented at trial to sustain Anderson's convictions.

2. Whether the district court erred in its instruction of the jury concerning jurisdiction.

3. Whether the district court used the proper sentencing guideline in sentencing Anderson.

III. STANDARDS OF REVIEW

The standard of review for a motion for acquittal based on sufficiency of the evidence is *de novo. United States v. Miles,* 290 F.3d 1341, 1355 (11th Cir. 2002). This Court views the evidence "in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor." *Id.* The standard of review for a motion for a new trial is abuse of discretion. *United States v. Pendergraft,* 297 F.3d 1198, 1204 (11th Cir. 2002).

This Court reviews *de novo* whether the district court misstated the law when instructing the jury or misled the jury to the prejudice of the defendant. *United States v. Deleveaux,* 205 F.3d 1292, 1296 (11th Cir. 2000). A court's refusal to give a requested jury instruction is reviewed for abuse of discretion. *United States v. Roberts,* 308 F.3d 1147, 1153 (11th Cir. 2002). "A trial judge's refusal to give a requested instruction will warrant a new trial only if (1) the requested instruction was substantively correct, (2) the court's charge to the jury did not cover the gist of the instruction, and (3) the

failure to give the instruction substantially impaired the defendant's ability to present an effective defense." *Id.*

A challenge to the application of the sentencing guideline is a mixed question of law and fact. *United States v. Ferreira,* 275 F.3d 1020, 1024 (11th Cir. 2001). This Court reviews the district court's findings of fact for clear error and its application of the sentencing guidelines to those facts *de novo. Id.* Additionally, "interpretation of the Sentencing Guidelines is similar to statutory interpretation and is subject to de novo review on appeal." *Id.* (quoting *United States v. Goolsby,* 908 F.2d 861, 863 (11th Cir. 1990)).

IV. ANALYSIS

A. Sufficiency of the Evidence

The jury found Anderson guilty of violating the Sherman Antitrust Act which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations" is illegal. 15 U.S.C. § 1. Anderson was also found guilty of violation of 18 U.S.C. § 371, which provides that individuals may be fined or imprisoned for up to five years, or both, who "conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose" and who "do any act to effect the object of the conspiracy."

Anderson argues that the evidence presented at trial was insufficient to sustain his convictions for four reasons. First, he argues the Government failed to prove the single, overarching conspiracy alleged in the indictment. Second, he alleges that the charges against him are barred by the statute of limitations. Third, he contends that the Government failed to prove he knew of or was connected to any "agreement," an essential element of a conspiracy. Fourth, he avers that the

government failed to establish subject matter jurisdiction over the foreign conduct in this case.

1. Evidence of a single, overarching conspiracy

Anderson argues the evidence presented at trial fails to prove a single, overarching conspiracy encompassing the bid-rigging, as alleged in the indictment. He asserts that the negotiations on the contracts were "wholly separate" and that the Government failed to present evidence of rigging or attempting to rig all three bids. The Government responds that the evidence presented at trial was in accord with the allegations of the indictment and that a reasonable jury could have found a single conspiracy on the evidence presented at trial. Two issues are thus before the Court: 1) the substantive aspect of whether the government indeed established a single conspiracy, and 2), the procedural aspect of whether there is a material variance between how Anderson was charged and what the government's evidence established at trial.

Anderson's main argument is that the government's evidence failed to establish and the jury wrongly found a single overarching conspiracy. This Court narrowly reviews this argument: "We may reverse a jury's finding that a single conspiracy existed only if the evidence, viewed in the light most favorable to the government, could not permit reasonable jurors to have found, beyond a reasonable doubt,' that there was a single conspiracy." *United States v. Taylor,* 17 F.3d 333, 337 (11th Cir. 1994) (quoting *United States v. Brito,* 721 F.2d 743, 747 (11th Cir. 1983)). Three relevant factors determine whether a single conspiracy existed: (1) whether there was a common goal, (2) the nature of the scheme, and (3) the overlap of the participants. *US. v. Chastain,* 198 F.3d 1338, 1349 (11th Cir. 1999). No material variance exists if a reasonable fact finder could have found the existence of a single conspiracy. *Id.*

We conclude that a reasonable jury could have found a single conspiracy on the facts of this case. First, the common goal of the overarching bid-rigging scheme was to steal from the United States by inflating the winning bids. The written agreement on the first contract, 20A, shows a common goal among the conspirators to reciprocate on future contracts, including Contract 29, the third contract in this case.

Second, Anderson's alleged comments to Johnny Ollis about the "Frankfurt Club" of bidders implies a group of individuals involved in a single enterprise. Additionally, those involved in the scheme by which the bids were rigged worked in a consistent manner on all three contracts. Schmidt contacted the participating pre-approved bidders and arranged a meeting in Frankfurt. The representatives of the bidders agreed which company would win the bid and what the others would receive for bidding high. The bid prices were raised to accommodate the higher anticipated profits as well as the losers' fees.

Finally, although the participants were different in each meeting, there was substantial overlap. Schmidt clearly had a leading role in all three negotiations. This Circuit permits the finding of a single conspiracy where a "key man" directs the activities, coordinating the individual efforts of various combinations of people. *United States v. Taylor*, 17 F.3d at 337. The jury also had testimonial evidence that Anderson himself was present during the rigging of the bids on all three contracts. Although some of the evidence presented at trial may be less than credible, as Anderson argues, the weight of the evidence considered as a whole is sufficient to support the jury's finding that the bid-rigging scheme was a single, overarching conspiracy.

Because we hold that a reasonable fact finder could have found the existence of a single conspiracy, we necessarily conclude that no material variance existed between the in-

dictment and the evidence presented at trial. *See Chastain*, 198 F.3d at 1349.

2. Statute of limitations issues

The parties agree that the statute of limitations period for a charge brought under both the Sherman Antitrust Act and § 371 is five years. Anderson contends, however, that the charges brought against him were time-barred because the Government failed to prove an overarching conspiracy, and the only purportedly illegal acts (his involvement in Contracts 20A and 07) to which the Government connected Anderson were completed more than five years before the indictment against him was filed. The final payments on contracts 20A and 07 were made by January 18, 1995. The indictment against Anderson was not returned until July 25, 2001 - more than six and a half years later. The final payments on Contract 29, however, did not occur until September 20, 1996.

As we concluded above, the Government presented sufficient evidence to permit the jury to conclude that the three contracts were part of a single, overarching conspiracy. Anderson was personally involved in the negotiations of the first two contracts, Contracts 20A and 07. Furthermore, contrary to Anderson's assertion, circumstantial evidence indicates that Anderson was in Frankfurt during the negotiations of Contract 29, knew about the negotiations, and agreed with the bid-rigging scheme.

The final payment of Contract 29 was not made until September 1996, within the five year limitations period. Anderson contends that because this payment was not an *overt act* in furtherance of the conspiracy but merely the *result* of the conspiracy, the statute of limitations bars prosecution against him. *See United States v. Doherty*, 867 F.2d 47, 61-62 (1st Cir. 1989). In *Doherty*, however, the "result" of the conspiracy found not to extend the statute of limitations was the receipt of a wrongfully-increased salary.

Id. at 61. In this case, the final payment on Contract 29 and the acceptance of that payment was part of the conspiracy to illegally obtain government funds under the contract. *See United States v. Girard*, 744 F.2d 1170, 1172-73 (5th Cir. 1984); *United States v. Walker*, 653 F.2d 1343, 1350 (9th Cir. 1981). The conspiracy continued until the conspirators received the full economic benefits anticipated by their bid-rigging scheme. *Girard*, 744 F.2d at 1172.

Because each of the contracts were part of the bid-rigging conspiracy and the last payment for Contract 29 occurred within the five years prior to Anderson's indictment, the evidence compels the conclusion that the charges against Anderson were not barred by the statute of limitations.

3. Anderson's knowledge of and connection to the agreements

Anderson correctly asserts that an essential element of a conspiracy is that the alleged conspirator knew of and voluntarily participated in the agreement. *United States v. U.S. Gypsum* Co., 438 U.S. 422, 98 S.Ct. 2864 (1978). Anderson maintains that he did not know of or voluntarily participate in the agreements essential to the conspiracy, and argues that the Government has not proved that he did.

Nevertheless, Anderson's participation in the conspiracies can be established at least by circumstantial evidence, if not by direct evidence. *See United States v. Lyons, 53* F.3d 1198, 1201 (11th Cir. 1995). The Government need only prove that Anderson knew the general nature and scope of the conspiracy. *United States v. Clark, 732* F.2d 1536, 1539 (11th Cir. 1984). Anderson alleges the Government failed to produce sufficient evidence to permit a reasonable fact finder to conclude he knew of the illegal bid-rigging agreements. Because we construe the evidence in the light most favorable to the government and draw all reasonable inferences in its favor, it is difficult for Anderson to establish that he knew

nothing of the conspiracy and bid-rigging. The following is an abbreviated list of the evidence presented by the Government suggesting Anderson had knowledge of the illegality of the bid-rigging schemes:

(1) A letter prepared for Anderson's signature written on August 3, 1988, the same day as the agreement on Contract 20A, raising Harbert-Jones' bid price on the contract, inviting the inference that Anderson knew the bid was being raised pursuant to the illegal agreement;

(2) Testimony by Mr. Iatrou that Anderson was present and taking part in the discussion at the December 7, 1988 meeting in which the agreement on Contract 20A was discussed and amended and that Anderson wrote down the agreement;

(3) Testimony from witnesses, including Schmidt, that Anderson was Schmidt's contact in the United States;

(4) Payments pursuant to Contract 20A made from Harbert-Jones accounts, raising the inference that Anderson knew of the transactions and approved their distribution;

(5) Testimony that Anderson told Johnny Ollis that the agreement on Contract 07 had been set up by the Frankfurt Club, implying that Anderson knew the bidding process had been subverted;

(6) Anderson's purported presence at numerous meetings at which bids were rigged or agreements were discussed.

While the Government's evidence may not be overwhelmingly persuasive, taken together, it is more than sufficient to permit a reasonable fact finder to conclude Anderson had knowledge of the bid-rigging agreements. Anderson's objection is therefore unfounded.

4. Subject matter jurisdiction

The Sherman Act reaches conduct outside the borders of the United States, but only when the conduct is intended to and does in fact produce a substantial effect on commerce in the United States.[2] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,796, 113 S.Ct. 2891, 2909 (1993). In 1982, Congress enacted the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6(a) (FTAIA), to limit American courts' jurisdiction over international commerce to transactions that affect the American economy. The FTAIA provides that U.S. antitrust law does not apply to non-import foreign commerce unless (1) the conduct has a direct, substantial, and reasonably foreseeable effect on domestic commerce, and (2) the effect gives rise to a claim under the Sherman Act. Anderson contends the court lacked jurisdiction to entertain the Sherman Act charges against him because the activity at question in this case took place in foreign countries and the Government failed to prove that it had a substantial effect on domestic commerce. Anderson relies upon *United States v. Nippon Papers Indus. Co.*, 109 F.3d 1, 6-8 (1st Cir. 1997), for the proposition that his alleged conduct affected only foreign markets, as the structure of USAID is designed to target foreign markets in need of American economic assistance.

Anderson's jurisdictional arguments must be rejected for two reasons. First, the FTAIA does not apply to the facts of this case. On its face, the FTAIA only applies "to conduct involving trade or commerce . . . with foreign nations[.]" There is no indication Congress intended the FTAIA to apply to government programs such as USAID in which the U.S. government pays U.S. companies who have bid against other U.S. companies to complete construction projects in foreign

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[2] As Anderson points out, this subject matter jurisdiction argument applies *only* to his Sherman Act violation, not his § 371 violation. Neither the FTAIA nor *Hartford Fire* apply to § 371.

countries. Virtually all of the money flowing in a USAID program is between the US. government and U.S. companies. Although the benefit is shared by foreign nations, Anderson fails to articulate how this scheme involves trade or commerce with foreign nations.

Second, even if the FTAIA were to apply, Anderson's conduct had a substantial effect on domestic commerce. The Government presented considerable evidence that Anderson's scheme intended to have, and actually did have, a substantial effect on domestic commerce. The bid-rigging scheme took money from the federal treasury, depriving other projects and services of money. Key decisions and agreements were made at corporate headquarters across the United States, including Alabama (Harbert) and North Carolina (Jones). Federal money was deposited in Harbert's accounts at SouthTrust Bank in Alabama. Harbert-Jones made payments to other conspirators out of this same account. The contracts provided that the equipment and materials used to complete the construction projects must be, and they were indeed, purchased in the United States. The equipment and materials were shipped from New Orleans on American freighters. Taken as a whole, the bid-rigging scheme in which Anderson participated relied upon and substantially affected domestic commerce. For these reasons, Anderson's subject matter jurisdiction objection must fail.

B. Jury Instruction on Jurisdiction

As noted above, some acts of the defendants occurred in foreign countries with an effect upon U.S. commerce and some acts occurred in this country. The jury should have been, and was, instructed on both contingencies.

Anderson argues both that an erroneous charge was given and that a proper charge was refused. A refusal to give a requested instruction is reversible if "the requested instruction '(1) was correct, (2) was not substantially covered by the

court's charge to the jury, and (3) dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense.'" *United States v. Morris*, 20 F.3d 1111, 1115-6 (11th Cir. 1994). Generally, however, district courts are granted broad discretion to formulate jury instructions as long as the jury charge as a whole correctly applies the law and states the facts. *See United States v. Moore*, 253 F.3d 607, 609 (11th Cir. 2001). This Court "will not reverse a conviction on the basis of a jury charge unless the issues of law were presented inaccurately, or the charge improperly guided the jury in a substantial way as to violate due process." *Id.* Although the jury instruction in this case was not a model of clarity, it did not violate Anderson's due process rights.

The first part of the jury instructions on the Sherman Act count was a standard charge appropriate in domestic antitrust cases. Anderson contends this charge was incorrect because this case involved wholly foreign conduct, not the domestic conduct ordinarily found in Sherman Act cases. As discussed above, we reject this contention. The Government presented substantial evidence of domestic conduct in the alleged conspiracy. By targeting a USAID program as the object of the conspiracy, the conspirators virtually ensured conspiratorial conduct would take place in the United States. The standard Sherman Act jury instruction was therefore proper.

The district court added only the first sentence of Anderson's proposed jury instruction onto the standard Sherman Act instruction. Anderson's proposed instruction was a confusing amalgam of rules and principles derived from various circuit and Supreme Court cases, especially the First Circuit's decision in *Nippon Paper*. The court gave the first sentence of Anderson's proposed instruction, "I further instruct you that the Sherman Act applies to foreign conduct if and only if that conduct was meant to produce and did, in fact, produce some substantial effect upon trade or commerce

in the United States." This sentence instructed the jury in accordance with *Nippon Paper* where all the conduct was foreign. We conclude that this instruction was not unduly confusing. It was reasonable for the district judge to instruct the jury as to two theories of the case: (1) the conduct was domestic, so the *Harford Fire* rules apply, or (2) the conduct was entirely foreign, so the *Nippon Paper* rules apply. The jury's finding could have been based on either theory, as both were supported by the evidence. Furthermore, the district court properly rejected the remainder of Anderson's proposed jury instructions because they were legally erroneous. The jury instructions given by the district court were not hopelessly confusing, and certainly did not violate Anderson's due process rights.

C. Sentencing Issues

Anderson objects to the court's application of the Sentencing Guidelines on two grounds. First, he contends the court improperly applied USSG § 2F1.1 rather than § 2R1.1 to calculate his sentence for Count Two. Second, he contends the court should have considered a heartland departure under 18 U.S.C. § 3553(a) based on the totality of the circumstances.

1. Proper guideline for count two

Both parties agree that § 2X1.1 was the proper starting point for analyzing Count Two. Section 2X1.1 is the general attempt, solicitation, or conspiracy guideline, and it provides that the base offense level from the guideline should be applied for the substantive offense. Anderson and the Government disagree, however, whether § 2Fl.1 or § 2R1.1 is the proper guideline for the substantive offense.

The district court determined Anderson's sentence by grouping Count One (Sherman Act) and Count Two (§ 371)

under USSG § 3D1.2. The court then applied § 2F1.1 (1995)[3], granted a downward departure pursuant to Application Note 13, and imposed a sentence of 36 months. Anderson argues the court erred by applying § 2F1.1, the fraud guideline, rather than § 2Rl.1, the bid rigging guideline. The Government responds that the district court chose the proper guideline for two reasons: first, § 2X1.1 guides the court to § 2F1.1, and second, bid rigging was merely a means to commit fraud here, not the object of the conspiracy itself.

Anderson asserts that § 2F1.1 applies to the first part of 18 U.S.C § 371, in which the Government must prove an agreement to commit a separate substantive offense, but not to the second part, which simply makes it a crime to conspire to defraud the United States, Because Anderson was prosecuted under the second part, he argues § 2F1.1 should not apply. This is a torturous reading of the guidelines. Anderson fails to establish that the Sentencing Commission intended to distinguish between the two parts of § 371. If they intended to do so, they would have made their intent clear. Because they did not do so, we must assume § 2F1.1 applies to both parts of § 371. Furthermore, § 2Xl.l(c) does not require the use of § 2R1.1 in this case because § 2R1.1 is not listed in Application Note 1 as a guideline that expressly covers conspiracy. The substantive offense in this case was fi-aud, so § 2Fl.1 applies.[4]

There is no question Anderson engaged in bid rigging. There is also no question the purpose of the bid rigging was to defraud the Government. Anderson fails to make a

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[3] Section 2F1.1 was deleted and consolidated in § 2B1.1 in 2001, prior to sentencing in this case. The parties consented, however, to the use of the 1995 Guidelines, in which § 2F1.1 stood by itself.

[4] At the very least, we can conclude § 2Fl.l and § 2R1.1 equally apply to the conduct in this case. In such an event, we apply the provision that results in the greater offense level. USSG § 1B1.1 App. Note 5. In this case, § 2Fl.l results in a greater offense level that § 2Rl.l.

compelling argument why the Government must charge him with fraud and gain a conviction for fraud in order for § 2F1.1 to apply. The conviction in this case assumes Anderson committed fraud. Bid-rigging was merely a means to an end. Anderson relies on *United States v. Rubin*, 999 F.2d 194, 196-97 (7th Cir. 1993), for the proposition that where the fraud and the anti-competitive activity are inseparable (ie, the purpose of the fraud was merely to conceal the anti-competitive activity), § 2F1.1 should not apply. Anderson mistakes the purpose of the fraud in this case. Unlike *Rubin*, the purpose of Anderson's bid rigging was to commit fraud. The object was fraud, not bid-rigging. Section 2Fl.l was the proper guideline to apply.

2. Propriety of a heartland departure

During the sentencing phase of Anderson's trial, the district judge made two comments at sentencing regarding Anderson's motion for a departure under 18 U.S.C. § 3553(a). First, the judge said he did not think a prima facie case had been made for a departure. If no prima facia case were made for a departure, the court's denial of the departure would not be reviewable. *United States* v. *Brenson*, 104 F.3d 1267, 1286-87 (11th Cir. 1997). Second, the district judge said he lacked the authority to grant such a departure. This statement opens the door to appellate review. *United States v. Chase*, 174 F.3d 1193, 1195 (11th Cir. 1999). Anderson argues that the district court could have granted such a departure and requests that this court do so. The Government, while acknowledging the judge erred in concluding he lacked the authority to depart, believes the error was harmless because the facts of this case provide no valid basis for a heartland departure.

A defendant may not ordinarily appeal a district court's refusal to grant a downward departure. *US. v. Webb*, 139 F.3d 1390, 1394 (11th Cir. 1998). Where the court erroneously believed that it lacked the authority to grant the downward

departure, however, the defendant may appeal the court's failure to downward depart. *Id.* Here, the government concedes that the district judge erroneously found that he did not have the authority to grant a downward departure. Anderson would like this court to settle the matter and determine not only that the district court had the authority to grant a downward departure, but also to order that a downward departure should be given. This we will not do. While we conclude that the district court erroneously believed it lacked the discretion to depart downward in this instance, we express no view as to whether a downward departure should in this instance be granted. *See id.* at 1396. We instead hold that the district court may exercise its discretion to decide whether a departure is warranted with respect to Anderson and remand this cause for this purpose.

V. CONCLUSION

With the exception of the sentencing issue, all of the issues presented by Anderson in this appeal are without merit. Accordingly, Anderson's convictions are affirmed, but we conclude that the district judge erred when he found that he did not have the authority to give a downward departure. AFFIRMED IN PART and REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jun 12, 2003]

No. 02-13168-CC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ELMORE ROY ANDERSON,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____F.2d ____).

Before: DUBINA and BLACK, Circuit Judges, and RYSKAMP *, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Duina
JOEL F. DUINA
UNITED STATES CIRCUIT JUDGE

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* Honorable Kenneth L. Ryskamp, United States District Judge for the Southern District of Florida, sitting by designation.